(3)

IN THE HIGH COURT OF CHHATTISGARH AT BILASPUR C.G.

Cr.A.No. 877/2002

APPELLANT : DASAMU S/O Raradeshi aged 21 yrs.
R/o village Maulipar P.S.Darabha
Distt.Bastar (C.G.).

VERSUS

RESPONDENT : State of Chhattisgarh,
through P.S.Darbha.

MEMORANDUM OF CRIMINAL APPEAL U/S. 374(2)
CRIMINAL PROCEDURE CODE.

Sentence.

(21)

XI-HC-78

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक Cr.A.No 872/02 **सन् 200**

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

DIVISION BENCH:-
HON'BLE MR. L.C. BHADOO, Ag. C.J.
HON'BLE MR. SUNIL KUMAR SINHA, J

17.1.2007

Ms. Uma Tiwari, Advocate for the appellant.

Mr. Ravindra Agarwal, Panel Lawyer for the State.

Heard.

Oral judgment dictated on *Dais*.

Per Sunil Kumar Sinha, J.

This appeal is directed against the judgment of conviction and order of sentence dated 18th February, 2002 passed by the 3rd Additional Sessions Judge, Bastar at Jagdalpur in Sessions Trial No.367/01. By the aforesaid judgment, the appellant has been convicted under Section 302 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life. The appellant has also been convicted under Section 201 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for two years.

The case of the prosecution, in brief, is that on 30.6.2001 at about 8.00 p.m. Chingdu (since deceased) was called by the appellant herein on the pretext that they will go to see Goncha Mela, on which Chingdu accompanied the appellant and went to see the Mela and since then the whereabouts of Chingdu were not known. The father of Chingdu

P.T.O.

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -2-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

namely Chamra made a search to find out the whereabouts of Chingdu and in this regard, a Panchayat was also convened in the village. The appellant was present in the said Panchayat. He told the Panchas that on the fateful night, in between 1 to 4° clock, he & Chingdu were returning back from Mela. When they reached near Masiya Munda culvert, there was some quarrel between them, as Chingdu was making certain allegations about the theft on him and therefore, he murdered Chingdu by putting towel around his neck and pressing the same over his neck. He also stated that when Chingdu died, he buried the dead body just below the said culvert. On receiving this information they went near the village culvert and saw that dogs are pulling the leg of a human body, which was coming out from the earth. Upon which Dehati Nalishi (Ex.P-5) & Merg Intimation (Ex.P-6) were recorded in the Police Station Darbha. Sarpanch namely Son Singh also gave merg intimation (Ex.P-7) to the police regarding seeing of a dead body. Receiving this information, the Station House Officer, Police Station Darbha registered the F.I.R. (Ex.P-16) and left for the scene of occurrence. In presence of the Executive Magistrate Shri K.L. Sori (PW-1) dead body of deceased was exhumed and a Panchnama (Ex.P-1) was prepared. After exhuming the dead body, the Panchas identified the dead body to be that of the deceased under Ex.P-2. The body of deceased was sent for postmortem examination to the Primary Health Centre, Darbha under Ex.P-3, where

XI-HC-78

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश —3—	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Dr. A.D. More (PW-7) conducted the postmortem and prepared the postmortem report Ex.P-12. During postmortem examination, the doctor noticed six injuries on the body of deceased and found the body in decomposed condition. While in police custody, the accused gave memorandum (Ex.P-20), in pursuance of which towel & spade were taken into possession under Ex.P-9. Site plan (Ex.P-18) of the place of occurrence was prepared.

During the course of investigation, it was found that co-accused Bhulku alias Sukru had helped the appellant in disposing of the dead body of deceased in the above manner, therefore, after completion of investigation, a charge sheet under Sections 302 & 201 of the IPC was filed against the appellant herein and under Section 201 of the IPC against co-accused Bhulku in the Court of Judicial Magistrate 1st Class, Jagdalpur on 6.8.2001, who in turn committed the case to the Court of Sessions, where the file was received on 17.8.2001 and thereafter, it was transferred to the Court of 3rd Additional Sessions Judge, Jagdalpur, who after receiving the file conducted the trial.

The prosecution in order to establish the charge against the accused persons examined as many as 11 witnesses. The Additional Sessions Judge recorded the statements of accused persons under Section 313 of Cr.P.C. on 7.2.2002, in which they denied the material brought against them by the prosecution and ultimately after hearing

XI-HC-78

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश — ५ —	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

the arguments of counsel for both the sides, the Additional Sessions Judge convicted and sentenced the appellant herein in the manner aforementioned. However, he acquitted the co-accused Bhulku alias Sukru of the charge under Section 201 of the I.P.C.

In this case, the conviction of the appellant is based on three sets of evidence;

1. Testimony of eyewitness namely Shanti Bai (PW-3)
2. Extrajudicial confession said to have been made by the appellant before Sonsingh (PW-2) & Thulthuli (PW-5); and
3. Evidence of PW-4 Chamra, father of deceased, who stated that his son Chingdu had gone with the appellant on the pretext that they are going to see Goncha mela.

Learned counsel for the appellant argues that the evidence of Shanti Bai (PW-3) is not reliable, as she has admitted in her cross-examination that, in fact, she had not seen the quarrel between the deceased and the appellant. As far as the extra judicial confession made by the appellant before PW-2 Son Singh & PW-5 Thulthuli is concerned, she argues that the evidence of Son Singh (PW-2) & Thulthuli (PW-5) are not fully reliable, as their evidence suffers with many material discrepancies. About the evidence of Chamra (PW-4), she argues that this witness has stated in his cross-examination that his son has not

P.T.O.

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश —5—	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

gone all alone with the appellant, but many other persons of the village have also gone with them, therefore, theory of last seen together cannot be applied in this case.

On the other hand, learned Panel Lawyer for the State supports the judgment of conviction passed by the Sessions Court.

We have heard Ms. Uma Tiwari, Advocate for appellant and Mr. Ravindra Agarwal, Panel Lawyer for the State at length and perused the records of sessions trial and impugned judgment.

Shantibai (PW-3) says in her examination-in-chief that on the fateful day she had also gone to see Goncha, in the night at about 8.00 p.m. she was returning back from Goncha along with her friend namely Budri, when they reached near the culvert, they heard the cries of quarrel. She has further stated that the appellant was fighting with Chingdu. In the last sentence of her examination-in-chief she has stated that Chingdu died on account of assault given by the appellant. In Para-4 of her cross-examination, she has stated that she has not disclosed about the quarrel between accused and deceased to anybody in the village. She has specifically admitted in the last part of her cross-examination that she had not seen the appellant assaulting Chingdu.

After considering the entire evidence of this witness, it appears to us that, in fact, her statement regarding quarrel between the appellant and the deceased & further regarding the fact that she had

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश —6—	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

seen the appellant assaulting the deceased, does not appear to be reliable. In fact, in view of the clear admission made by her in cross-examination that she had not seen the appellant assaulting the deceased, makes it clear that she had not witnessed the incident on the fateful night. Therefore, in the opinion of the Court, the testimony of this witness does not inspire confidence of the Court so as to connect the appellant with the crime in question, as her testimony is not reliable.

As far as the extrajudicial confession made by the appellant before PW-2, Son Singh & PW-5, Thulthuli is concerned, Son Singh (PW-2) has stated in his examination-in-chief that there was a village Panchayat before making the report to the police. In that Panchayat, Chamra, father of deceased, was also present. Chamra has stated that his son Chingdu is missing since Goncha Bazar day. He has further stated that on the said day at about 8.00 p.m. his son was called by appellant Dashmu, his son left the house along with appellant Dashmu and since then his whereabouts are not known. PW-2 has also stated that Dashmu was present in the Panchayat, but he has not stated anything, however, when the Panchayat enquired from him, he admitted that he murdered Chingdu by using a towel because Chingdu was trying to implicate him by alleging theft of shoes. PW-2, Son Singh, has further stated that appellant has also stated that thereafter he brought one spade and with the help of that spade he buried the dead body of

(28)

(27)

XI-HC-78

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -7-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

Chingdu. In the cross-examination, this witness has stated about the arrival of police as also that of Naib Tehsildar & Sub Divisional Officer in the village. He has admitted vide Para-4 that before arrival of these persons, he was not knowing as to who had murdered Chingdu. The police was in search of the friends of the deceased. Thereafter the appellant was arrested and was taken to the police station. After the arrest of appellant, dead body of deceased was got exhumed by the police and at that time, in presence of the police, the appellant made extra judicial confession about the commission of crime in question. He has further admitted that before the said incident, no Panchayat etc had taken place and he does not know anything about it.

In the light of aforesaid admissions made by PW-2, Son Singh in his cross examination, it is not established that there was any Panchayat in the village and a confession was made before them. In fact, the confessional statement, which this witness is saying, was made by the appellant in presence of the police & other officials of the State when the dead body was exhumed by the police from the place of occurrence.

Other witness namely Thulthuli (PW-5) has stated that when Chingdu was not found in the village, a search was made by his father to trace out the whereabouts of Chingdu. After 9-11 days on Sunday, it came to the notice of the villagers that dead body of Chingdu is lying near the village culvert. One Hari Nag, resident of Village Keshapur has

P.T.O.

XI-HC-78

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -8-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

informed him this fact, on which he advised Hari Nag to inform the Village Patel etc. Thereafter, he went to the place of occurrence and on the spot, he could only see one leg of the dead body because other parts of the body were buried in the earth. On being asked, Chamra, father of Chingdu, informed him that his son was called and taken by the appellant and since then his son is missing. This witness has not deposed in his examination-in-chief regarding extrajudicial confession made by the appellant before him. However, in the cross-examination, after he being declared hostile by the prosecution, he states that when the villagers had asked Dashmu, he made confession before them that he had killed Chingdu. In his further cross-examination by the defence, he has admitted that police had taken the accused with them, he made extrajudicial confession before the police and at that time he was also present there.

In view of the above evidence regarding extrajudicial confession, it cannot be said that any confession was voluntarily made by the appellant in presence of these two witnesses. The factum of extra judicial confession being made either in the Village Panchayat or independently before these two witnesses or any other villager has not been established by the prosecution in this case. The evidence of these two witnesses regarding extrajudicial confession does not appear to be

XI-HC-78

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश —9—	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

reasonable and trustworthy to base the conviction of the appellant on the said evidence.

As far as the evidence of last seen together given by the father of deceased namely Chamra (PW-4) is concerned, in examination-in-chief this witness has stated that at about 8.00 p.m. in the fateful night his son had gone along with the appellant on the pretext that they are going to see Goncha, but in the cross-examination he has admitted that, in fact, he himself had not seen his son going along with the appellant rather his wife had told him that Chingdu had gone along with the appellant. He has specifically admitted that when Chingdu was going along with the appellant, he was not present in the house. Moreover, he also admits in Para 3 of his cross-examination that many other boys of the village had also accompanied the appellant when the deceased had gone with him. This fact itself breaks the theory of last seen together. For drawing an inference on the theory of last seen together, the essential condition is that the deceased must have been seen in the exclusive company of accused for the last time, thereafter he should not have been seen by anybody else and ultimately his dead body is seen after a close range of time from the time he being in the company of appellant for the last time. Therefore, in the opinion of this Court, the theory of last seen together is completely demolished by the cross-

XI-HC-78

उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -10-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

examination of Chamra (PW-4) and same is also not helpful or supporting to the prosecution.

In the facts and circumstances referred to above, the prosecution has not been able to prove the guilt of appellant beyond all reasonable doubt either on the evidence of eyewitness or on the evidence of extra judicial confession or on last seen together theory. Therefore, the finding of the trial court convicting the appellant for commission of offence under Sections 302 & 201 of the I.P.C. cannot be sustained, as the same is not based upon the cogent & reliable evidence produced by the prosecution.

In the result, the appeal succeeds and the same is allowed. Conviction and sentences imposed on the appellant under Sections 302 & 201 of the I.P.C. are hereby set aside and he is acquitted of the above charges. He be set at liberty forthwith, if not required in any other case.

Sd/-
L.C.BHADOO
Judge

Sd/-
Sunil Kumar Sinha
Judge

Roshan/-

P.T.O.